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In the Supreme Court of the United States

OCTOBER TERM, 1996

LIONEL SINGLETON, SR. AND
COOPER T. SMITH STEVEDORING COMPANY, INC.
Petitioners

v.

GUANGZHOU OCEAN SHIPPING COMPANY
Respondent

PETITION FOR A WRIT OF CERTIORARI

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69 pp

QUESTION PRESENTED

Whether, under §5(b) of the Longshore and Harbor Workers' Compensation Act, 33 USC §905(b), a shipowner has a duty to intervene in ongoing stevedoring operations when it 1) knows that a dangerous condition has developed and 2) the stevedore cannot be relied upon to remedy the condition such that an accident is inevitable?

PARTIES TO THE PROCEEDINGS

1) Lionel Singleton, Sr.
2) Guangzhou Ocean Shipping Company, an instrumentality of the People's Republic of China
3) Cooper/T. Smith Stevedoring Company

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 79 F.3d 26 (5th Cir. 1996), and is reproduced in the appendix at A-1. The Amended Judgment and the Findings and Conclusions of the United States District Court for the Eastern District of Louisiana are unreported, and are reproduced in the appendix at A-9 and A-11, respectively.

JURISDICTIONAL STATEMENT

The Court of Appeals entered its judgment on April 3, 1996. This Court has jurisdiction pursuant to 28 USC §1254(1).

STATUTE INVOLVED

This case involves §5(b) of the Longshore and Harbor Workers' Compensation Act, 33 USC §905(b), which provides as follows:

> In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person...may bring an action against such vessel as a third party..., and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.... The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.

STATEMENT OF THE CASE

Under this court's interpretation of §5(b) of the Longshore and Harbor Workers' Compensation Act in *Scindia Steam Nav. Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614 (1981), does a shipowner have a duty to intervene in a stevedore's ongoing cargo unloading operations when it has actual knowledge that the stevedore's unloading methods are so improvident and hazardous that, in the words of the ship's surveyor, "it was not a question will they have an accident, it was a question when will the accident happen?" Although the *Scindia*-based duty to intervene appears designed precisely for such a situation as this, the Fifth Circuit in this case answered the question in the negative and reversed the district court's judgment in favor of a severely injured, semiliterate longshoreman. The Fifth Circuit reached this result not by applying *Scindia*, but by relying on its own "something more" test for shipowner liability, which it first developed in *Futo v. Lykes Bros. Steamship Co., Inc.*, 742 F.2d 209 (5th Cir. 1984). This Court should grant certiorari in this case to review the judgment of the Fifth Circuit because the so-called "something more" test 1) as conceived by the Fifth Circuit is a gross departure from this court's teaching in *Scindia* and 2) as applied to the facts found by the district court in this case effectively eliminates any duty to intervene on the part of a shipowner in the Fifth Circuit.

1. Lionel Singleton, a longshoreman employed by Cooper/T. Smith Stevedoring Company, Inc. ("CTS"), was severely injured while offloading zinc and aluminum ingots from the forward-most hold (Hold 1) of the M/V MA GUAN HAI. The vessel was owned by Guangzhou Ocean Shipping Company ("GOSCO"), an instrumentality of the government

of the People's Republic of China, time chartered to Pacific Basin Shipping and Trading Company, Ltd., and sub-time chartered to Eurosteel Lines, Inc. ("Eurosteel").

The M/V MA GUAN HAI docked in New Orleans on June 1, 1988, carrying primarily a cargo of steel, but also zinc and aluminum ingots. CTS had been retained by Eurosteel to offload zinc ingots from the forward section of Hold 1, which it began doing on June 2, 1988, using the ship's winch to lift the ingot bundles up through the hatch. CTS continued to unload the cargo in this manner that entire day. Captain Bram Coumou, engaged as the vessel's cargo surveyor, observed CTS' unloading practices throughout that day, and concluded they were unsafe and certain to cause an accident. As was his custom, he reported his observations to the ship's first mate.

Lionel Singleton was injured on the morning of June 3, 1988. While he was standing on top of a tier of ingots attaching a winch sling to a bundle, the tier under him collapsed. Singleton was thrown to the deck and crushed under the falling bundles. As a result of the accident, Singleton sustained multiple compound comminuted fractures of the tibias and fibias of both of his legs, four fractures of his pelvis, a fracture of the heel bone of his left foot, and a severing of his urethra. He was surgically implanted with large rods in both legs which extend from beneath the knee joint to the ankle. He must undergo urethral dilation on a monthly basis for the rest of his life. He will likely require two hip replacement surgeries and a left ankle fusion in the future. Furthermore, because Singleton has an I.Q. of 68 and reads at only a second percentile (2%) capacity, the permanent physical

injuries he sustained has rendered him totally and permanently disabled from any future employment.

2. Singleton brought this suit in Louisiana state court against GOSCO and Eurosteel pursuant to 33 USC §905(b), asserting two theories of shipowner negligence. He first contended that the defendants breached their turnover duty by failing to eliminate or warn about a shipboard hazard which existed in the stow prior to the time offloading operations commenced. More specifically, Singleton alleged that the loading stevedore in Antwerp had originally stowed the zinc ingots with inadequate dunnage and chocking, allowing the stow to become dangerously destabilized in its innermost tiers during the voyage and during the course of unloading. Because the defendants knew or should have known of the danger presented by this improper stow, Singleton contended they breached their turnover duty by failing to remedy or warn of it.

In the alternative, Singleton also alleged that the defendants breached their separate duty to intervene and halt the unloading operations when it became clear to them that 1) the offloading method employed by CTS was destabilizing the load to such an extent that, as Captain Coumou recognized, an accident was inevitable, and 2) CTS could not be relied upon to remedy the situation.

Eurosteel removed the case to the United States District Court for the Eastern District of Louisiana. GOSCO asserted that, because it was an instrumentality of the People's Republic of China, Singleton's claim against it was subject to the provisions of the Foreign Sovereign Immunity Act, 28 USC §1602, *et seq.*, which limited Singleton to a bench trial.

After a lengthy period of discovery, GOSCO moved for summary judgment, which was denied. Shortly before trial, Singleton settled with Eurosteel and the case proceeded to trial solely against GOSCO.

3. Following a two-week bench trial, the district court rendered judgment in Singleton's favor in the amount of $1,489,593.91, and apportioned fault as follows: GOSCO - 15%, CTS - 75%, and Singleton - 10%. The district court made detailed factual findings, in which it rejected Singleton's claim under the turnover duty, finding that its factual premise — that the zinc ingots were improperly stowed and dunnaged in Antwerp — was not supported by the record. The district court instead concluded that "the bundled ingots were professionally loaded, stowed, dunnaged and secured at Antwerp, and the method and condition of the dunnage and chocking were within the range of skilled and competent stevedoring practices." Findings and Conclusions, A-27.

The court did conclude, however, that GOSCO was negligent in its failure to intervene and stop the unloading operations before the accident occurred. In so holding, the district court first determined that the load of ingots collapsed beneath Singleton because it had been destabilized by CTS' offloading procedures. The court found as a factual matter that most if not all of the load of ingot bundles were stowed in Hold 1 forward of — and not directly below — the hatch, and thus almost entirely under deck and in the wings. The significance of this finding relates to CTS' decision to use the ship's winch (or crane) to directly unload the ingot bundles, as the district court explained:

> Specifically, by using the ship's crane wire to drag the thousand pound bundles across the stow to be lifted at an angle out through the hatch or lowered to the floor, CTS undermined the stability of the stow. By applying this considerable friction to the remaining tiers, CTS ripped the tiers apart with vector forces exacerbated by the angle of the crane wire.

Findings and Conclusions, A-32.

The district court imposed liability on GOSCO for not intervening in the face of actual knowledge of this situation and the fact that it would continue. Critical to this conclusion was the testimony of Captain Coumou, engaged as the vessel's cargo surveyor. He observed CTS' unloading operations proceed throughout June 2, 1988, knew they would result in an accident, and relayed this crucial information to the vessel's chief officer, who was a GOSCO employee.[1] On June 3, the accident predicted by Captain Coumou occurred.

After finding GOSCO liable and apportioning fault, the district court then reallocated the fault of CTS to GOSCO pursuant to *Edmonds v. Compaganie Generale Trans Atlantique*, 443 U.S. 256, 99 S.Ct. 2753 (1979), and rendered judgment for Singleton. GOSCO then appealed to the Fifth Circuit.

4. The United States Court of Appeals for the Fifth Circuit reversed the decision of the district court in a brief,

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[1] Coumou's testimony with respect to CTS' unloading operation was that, once the longshoremen began using the winch to pull bundles from under the deck, "it became an unsafe practice...because at that moment, they started doing that, it was not a question would an accident happen...*it was not a question will they have an accident, it was a question when will the accident happen.*" Trial Record, Volume 8, p. 67 (emphasis added).

almost peremptory opinion and rendered judgment for GOSCO. *Singleton v. Guangzhou Ocean Shipping Co.*, 79 F.3d. 26 (5th Cir. 1996). The Court of Appeals first found that there was ample evidence in the record to support the district judge's conclusion that the stow collapsed due to instability caused by the unloading procedure utilized by CTS. Significantly, the Fifth Circuit then held that the district court's factual finding that GOSCO had actual knowledge of the dangerous condition CTS had created in the hold was not clearly erroneous. *Singleton*, 79 F.3d at 28-9.

At this point in the analysis, *Scindia* required the Fifth Circuit to determine whether GOSCO also had actual knowledge that the stevedore could not be relied upon to remedy the dangerous condition it had created, thereby triggering GOSCO's duty to intervene. This the Fifth Circuit did not do, although the evidence demonstrated that the vessel's chief officer was aware that CTS was using the dangerous unloading practice at the time of the accident. Instead, it applied its multi-factored "something more" test and focused only on whether or not the ship's winch was mechanically defective, rather than on the state of GOSCO's actual knowledge. Finding that the winch was non-defective, and further that "the shipowner was entitled to assume that the stevedore would use the winch properly," 79 F.3d at 29,[2] the Fifth Circuit concluded that the "something more" necessary to trigger GOSCO's duty to intervene was lacking. The Court of Appeals therefore reversed the judgment in Singleton's

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[2] Of course, as discussed below, the entire *Scindia*-based duty to intervene recognizes that situations exist where this assumption is overcome by the shipowner's actual knowledge—in this case, actual knowledge that the winch was being used *improperly* by the stevedore, and that the improper use was creating a danger to longshoremen. The district court found that GOSCO had this knowledge (thus overcoming the assumption), and the Fifth Circuit held this factual finding was not clearly erroneous.

favor, and rendered judgment for GOSCO. Singleton now seeks review of that judgment.

REASONS FOR GRANTING THE WRIT

In *Scindia Steam Nav. Co., Ltd. v. De Los Santos,* 451 U.S. 156, 101 S.Ct. 1614 (1981), this court considered the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act ("LHWCA") and, more specifically, §5(b) of that Act to determine the extent of a shipowner's tort duty to stevedores under the amendments. Although the court in *Scindia* concluded that the intended effect of the 1972 Amendments was to place the primary burden for avoiding injuries to longshoremen upon the stevedore, *Scindia,* 451 U.S. at 180, 101 S.Ct at 1628 (Powell, J., concurring); see also *Howlett v. Birkdale Shipping Co., S.A.,* ____U.S.____, ____, 114 S.Ct. 2057, 2063 (1994),the court identified three general duties shipowners did owe to longshoremen:

1) to exercise ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property (the so-called "turnover duty"); [3]

2) To exercise reasonable care, once stevedoring operations have begun, to prevent injuries to

[3] A corollary to the "turnover duty" requires the vessel to warn the stevedore of any hazards on the ship or with respect to its equipment. *Howlett, supra.*

longshoremen in areas that remain under the active control of the vessel (the so-called "active operations duty");[4] and

3) to intervene in the stevedore's operations when the shipowner a) has actual knowledge that a dangerous condition exists or has developed during the cargo operations, and b) has actual knowledge that the stevedore cannot be relied upon to remedy the condition (the so-called "duty to intervene").

Scindia, supra, 451 U.S. at 166-8, 173-6, 101 S.Ct. at 1622, 1625-6; *Howlett, supra,* ____U.S. at ____, 114 S.Ct. at 2063.

Three terms ago in *Howlett, supra,* this court revisited the scope of a shipowner's turnover duty under §5(b) out of a concern that some courts had expanded the duty beyond that warranted by the 1972 Amendments. This case presents the reverse situation with respect to the shipowner's duty to intervene. The Fifth Circuit's "something more" test represents such a constriction of the shipowner's duty to intervene that renders it almost nonexistent. This court should grant a writ in this case to repudiate the "something more" test, and to restore to longshoremen in the Fifth Circuit the minimum level of safety protection afforded them by *Scindia* in situations where, as in this case, the shipowner knows the stevedore's unloading method is so improvident and dangerous that an accident will occur if he does not intervene.

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[4] This duty, discussed at great length in *Davis v. Portline Transportes Maritime,* 16 F.3d 532 (3rd Cir. 1994), also renders the shipowner liable it if actively involves itself in the cargo operations and negligently injures a longshoreman.

THE FIFTH CIRCUIT'S "SOMETHING MORE" TEST FOR DETERMINING A SHIPOWNER'S DUTY TO INTERVENE UNDER 33 USC §905(b) CONFLICTS WITH THIS COURT'S DECISION IN *SCINDIA* BECAUSE ITS MULTI-FACTORED APPROACH IMPROPERLY FOCUSES THE INQUIRY ON SHIPOWNER CONTROL RATHER THAN SHIPOWNER KNOWLEDGE

The "something more" test represents the Fifth Circuit's own unique gloss on the shipowner's duty to intervene. It has no support in either the language or policy of this court's analysis in *Scindia*, nor any comparable counterpart in any other circuit. Conceptually, it is flawed because it incorporates elements of the wholly separate "active operations duty" into its duty to intervene analysis.

The "something more" test originated in *Futo v. Lykes Bros. Steamship Co.*, 742 F.2d 209 (5th Cir. 1984), which was one of the Fifth Circuit's first post-*Scindia* cases. There, in language quoted approvingly by the Fifth Circuit in this case, the court stated:

> To impose a duty to intervene on the shipowner, respecting dangers not created by it which are obvious to the stevedore's employees and arise during and in the area of the stevedore's operations, *something more* is required than the mere shipboard location of the dangerous situation and the shipowner's knowledge of it.

Futo, 742 F.2d at 215 (original emphasis); see also *Singleton*,

79 F.3d at 28.[5] Taken literally, the *Futo* court was correct: *Scindia* makes clear that something more than actual shipowner knowledge of a dangerous condition *is* required to trigger the duty to intervene. It is also clear, however, that the additional element necessary to the shipowner's duty to act is actual knowledge that he cannot rely on the stevedore to remedy the situation. *Scindia*, 451 U.S. at 175-6, 101 S.Ct. at 1626 (where stevedore's judgment was so "obviously improvident" that he continued to work in the face of an unreasonable risk of harm to longshoremen, shipowner has duty to intervene). Therefore, under *Scindia*, the duty to intervene depends upon the existence of two conditions, both of which focus directly on what the shipowner actually knows: 1) that a hazardous condition exists which poses a danger or risk of harm to longshoremen, and 2) that the stevedore cannot be relied upon to remedy or correct the situation.

The Fifth Circuit, beginning in *Futo*, transformed this two-part analysis of the shipowner's actual knowledge into a multifactor test embracing considerations completely unrelated to shipowner knowledge. This analytical departure from *Scindia* was made explicit in *Casaceli v. Martech Intern., Inc.*, 774 F.2d 1322 (5th Cir. 1985), *cert. denied*, 475 U.S. 1108, 106 S.Ct. 1516 (1986), in which the Fifth Circuit reversed a jury verdict for the survivors of a diver who

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[5] A related question is whether the shipowner's duty to intervene is limited only to situations where the hazard results from a defect in the ship itself, its gear or equipment. The Fifth Circuit has twice rejected the notion that the duty to intervene exists only where the hazard is caused or created by a defective appurtenance of the vessel, first in *Futo, supra*, and then again in *Williams v. M/V Sonora*, 985 F.2d 808, 812 (5th Cir. 1993) ("This is simply not the law in our Circuit"). The Ninth Circuit appears to suggest otherwise. See *Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539 (9th Cir. 1991), *cert. denied*, ____U.S.____, 113 S.Ct. 413 (1992).

drowned while repairing a vessel. In so doing, the *Casaceli* court held that whether or not a shipowner had a duty to intervene depended upon the following considerations, which it gleaned from *Futo*:

> [1] whether the danger was open and obvious; [2] whether the danger was located within the ship or ship's gear; [3] which party created the danger or used the defective item and was therefore in a better position to correct it; [4] which party owned and controlled the defective item; [5] whether an affirmative act of negligence or acquiescence in the use of the dangerous item occurred; and [6] whether the shipowner assumed any duty with regard to the dangerous item.

Casaceli, 774 F.2d at 1328. The same six-factor test was again employed in *Williams v. M/V Sonora*, 985 F.2d 808 (5th Cir. 1993), this time to affirm a summary judgment granted in favor of a shipowner. In *Williams*, the court traced the development of the "something more" test in the Fifth Circuit and sought to harmonize that test with prior Fifth Circuit "duty to intervene" cases which did not mention the "something more" test, concluding that "in each of the previous cases that found owner liability there was either (i) some element of control; or (ii) an appurtenance of the ship involved." 985 F.2d at 814.[6] The shipowner's summary

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[6] Singleton submits that the need for harmony in the Fifth Circuit precedents arises from the fact that *none* of the cases discussed in *Williams* as finding owner liability mentions the "something more" test. See *Williams*, 985 F.2d at 813 n. 9, citing *Gay v. Barge 266*, 915 F.2d 1007 (5th Cir. 1990); *Randolph v. Laeisz*, 896 F.2d 964 (5th Cir. 1990); *Masinter v. Tenneco Oil Co.*, 867 F.2d 892 (5th Cir. 1989); *Helaire v. Mobil Oil Co.*, 709 F.2d 1031 (5th Cir. 1983); and *Turner v. Costa Lines Cargo Services*, 744 F.2d 505 (5th Cir. 1984). Conversely, Singleton could find no Fifth

judgment was affirmed in *Williams* because "not one of the *Casaceli* [i.e., something more] indicators points to owner liability." *Williams,* 985 F.2d at 815.

An analysis of the six factors comprising the "something more" test reflects that they constitute a significant departure from *Scindia*'s focus on shipowner knowledge as the touchstone for its duty to intervene. For example, the first factor, whether the danger was open and obvious, was specifically rejected as a consideration appropriate to the shipowner's duty to intervene in *Scindia.* 451 U.S. 176 n. 22, 101 S. Ct. 1626 n. 22 (no defense for shipowner that longshoreman continues to work in the face of an obvious danger). *Scindia* makes clear that a shipowner may have a duty to intervene to remedy even an open and obvious danger if he knows the stevedore will not do so.

An even more problematic deviation from the *Scindia* formulation of the duty to intervene results from the "something more" test's concern with the degree of shipowner control over the hazard. This is reflected to some extent in all of the remaining five factors, but particularly in factors three (which party *created the danger* or used the defective item and was therefore in a better position to correct it), four (which party owned and *controlled* the defective item), and six (whether the shipowner *assumed any duty* with regard to the dangerous item). None of these factors is concerned with the state of shipowner knowledge; rather, each seeks to determine whether the shipowner in the first instance created, or controlled the creation of, the hazard as a

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footnote 6 continued

Circuit decisions which expressly applied the "something more" test and found owner liability.

justification for the imposition of a duty to intervene. Similarly, the fifth factor, whether an affirmative act of negligence or acquiescence in the use of the dangerous item occurred, is directed towards whether or not the shipowner created the hazard by an affirmative act. In view of the large extent to which the "something more" test dwells on the shipowner's involvement in the actual creation of the hazard, it is no surprise that the Court of Appeals concluded in this case that, in the absence of a defective vessel appurtenance, the shipowner "had no duty to intervene unless some element of shipowner control over the dangerous procedure...was present." *Singleton,* 79 F.3d at 29, relying on *Williams, supra.*

The Fifth Circuit's view fundamentally misconceives the shipowner's duty to intervene, and conceptually blurs the distinction between that duty and the "active operations duty." The court in *Howlett* distinguished between these two duties as follows:

> The second duty, applicable once stevedoring operations have begun, provides that a shipowner must exercise reasonable care to prevent injuries to longshoremen in areas that remain under the "active control of the vessel." The third duty, called the "duty to intervene," concerns the vessel's obligations with regard to cargo operations *in areas under the principal control of the independent stevedore.*

Howlett, ____U.S. at ____, 114 S.Ct. at 2063 (emphasis added; citations omitted). This court made clear in *Howlett* and *Scindia* that, in appropriate situations, the shipowner has an affirmative duty to intervene into areas he does not control

to correct hazards he did not create. This duty, albeit a narrow one, is not premised on his control of an area or an appurtenance — because they are already under "the principal control of the independent stevedore," *Howlett, supra* — but on his actual knowledge of a hazard to longshoremen that the stevedore will not correct.

Both the plain language of this court's decisions, and the structural framework of the shipowner's duties under §5(b), establish that the duty to intervene is a wholly separate obligation from the one the shipowner has with respect to areas or equipment which remain under his control after stevedoring operations commence on the vessel. The Court of Appeals' approach has the effect of merging these two independent duties into one hybrid analysis, which conditions one (the duty to intervene) upon proof of the other (shipowner control). This is not only contrary to this court's precedents, but — as this case demonstrates — so restricts the shipowner's duty to intervene that it sanctions inaction even where the shipowner has actual knowledge of the hazard and actual knowledge that the stevedore will not correct it.

The end result of the Fifth Circuit's "something more" analysis is that the duty to intervene is subsumed into the active operations duty. The narrow emphasis on shipowner control, as distinct from shipowner knowledge, appears designed to limit the duty to intervene to situations where the vessel creates the danger and, more importantly, to eliminate any responsibility to intervene where stevedore negligence has created the danger.[7] This is particularly

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[7] The Court of Appeals in this case, particularly at oral argument, inquired time and again whether CTS should have prevented the accident by appropriately shoring up the load, or by the use of different equipment.

reflected in this case by the Court of Appeals' statement that "the shipowner was entitled to assume that the stevedore would use the winch properly." *Singleton*, 79 F.3d at 29. While this certainly is true as an initial matter, *Scindia* recognized that reliance on this assumption is no longer justified – and becomes vessel negligence within the meaning of §5(b) – when the shipowner obtains actual knowledge that the stevedore's improper use of the winch is creating a hazard to longshoremen that the stevedore will not correct.[8] In such a situation, the shipowner must intervene into an area of stevedore control. The Fifth Circuit's analysis eliminates this duty, contrary to *Scindia*.

Finally, such a result is not consistent with, and is in fact contrary to, good public policy. This court in *Scindia* and *Howlett*, and more so the courts of appeals in applying them, stressed that the narrowness of a shipowner's duty to intervene reflects the Congressional policy, embodied by the design of 1972 Amendments, of placing the primary responsibility for the safety of longshoremen upon the stevedore. This policy is premised on the notion that the stevedore is in the best position to avoid accidents during cargo operations. *Howlett*, ____U.S.____ at ____; 114 S.Ct. at 2065.

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footnote 7 continued

But determining whether or not the stevedore was negligent, or exercised improvident judgment, does not end the duty to intervene analysis under *Scindia*. To the contrary, that is precisely where it begins, for stevedore negligence or misjudgment is a necessary predicate to the shipowner's duty to intervene, at least to the extent that the shipowner is aware that the stevedore will not remedy a hazardous condition.

[8] Of course, the shipowner has no affirmative duty to supervise the use of the winch to ensure proper use. But where he comes by actual knowledge of improper use and actual knowledge that the stevedore will not cease such use, he can no longer remain inactive.

Nevertheless, the existence of a duty to intervene as an exception to the general rule of vessel immunity strongly reflects a countervailing safety policy favoring the avoidance of preventable accidents, and embodies a real world recognition that situations will come into existence where it is obvious the stevedore will not act to avoid an accident. It is in this situation that the shipowner must act. The Fifth Circuit's "something more" test goes too far in the unacceptable direction of allowing a shipowner to simply close his eyes to dangers which he actually knows threaten longshoremen and which he actually knows the stevedore will not correct.

In finding no duty to intervene in this case, the Fifth Circuit has rendered it virtually non-existent in the circuit which decides the largest number of §5(b) cases. GOSCO in this case had actual knowledge that CTS was offloading the zinc ingots in such a way as to destabilize the load, and make the accident inevitable. This information was provided to GOSCO by Captain Coumou, who observed CTS' improvident loading practice throughout the day of June 2, 1988, and who customarily provided such information to the vessel officers. Although the Fifth Circuit specifically concluded that the district court's factual finding with respect to GOSCO's actual knowledge of the danger was not clearly erroneous, it nonetheless relieved GOSCO of liability for its failure to act despite such actual knowledge. Further, the ship's officer was aware that CTS was using the improvident unloading method at the time of the accident. If a shipowner has no duty to intervene under *Scindia* when it actually knows its failure to do so will result in an accident, then such a duty does not exist.

CONCLUSION

This court should grant certiorari in this case out of the same concern which prompted its grant of certiorari in *Howlett*: that the Court of Appeals' construction of §5(b) of the LHWCA threatens to upset the careful triangular balance between the shipowner, the stevedore, and the longshoreman struck by Congress in enacting the 1972 Amendments. The Fifth Circuit's application of its unique multi-factor "something more" test has rendered the shipowner's duty to intervene inapplicable to a situation where the shipowner knows an accident will occur due to stevedore improvidence if he does not intervene. This conclusion extinguishes the duty to intervene in the Fifth Circuit — except where a defective appurtenance causes the accident — contrary to *Scindia*, and eliminates the minimal level of protection afforded longshoremen from the improvidence of their employers.

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon counsel for all parties via telefax, hand delivery, or by placing same in the United States Mail, postage prepaid and properly addressed, this 2nd day of July, 1996.

APPENDIX A

Lionel SINGLETON, Sr.,
Plaintiff-Appellee,

v.

GUANGZHOU OCEAN SHIPPING COMPANY, et al.,
Defendants.

GUANGZHOU OCEAN SHIPPING COMPANY, Defendant-Appellant,

v.

COOPER/T. SMITH STEVEDORING COMPANY, INC., Intervenor-Appellee.

No. 94-30642

United States Court of Appeals,
Fifth Circuit.

April 3, 1996.

Longshoreman who was severely injured while offloading metal ingots from hold of vessel brought suit against vessel owner and charterer in state court. After suit was removed, stevedore which employed longshoreman intervened, seeking reimbursement pursuant to the Longshore Workers Compensation Act (LHWCA). After longshoreman settled with charterer, the United States District Court for the Eastern District of Louisiana, Henry A. Mentz, Jr., J., entered judgment in favor of longshoreman against

shipowner for $1,340,634.52, and shipowner appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that shipowner's mere knowledge of dangerous condition that stevedore had created in cargo hold by use unsafe unloading procedure did not trigger *Scindia* duty to intervene, absent proof of "something more," and stevedore's use of nondefective ship's winch did not provide that proof.

Reversed and rendered.

Christopher Ogilvie Davis, William J. Riviere, Phelps Dunbar, New Orleans, LA, Luther T. Munford, Phelps Dunbar, Jackson, MS, for Guangzhou Ocean Shipping Co.

Robert Murray Johnston, Adams & Johnston, New Orleans, LA, for plaintiff-appellee.

Alan G. Brackett, Hebert, Mouledoux & Bland, New Orleans, LA, for Cooper/T. Smith.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before KING, DAVIS and BARKSDALE, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

A shipowner appeals from the district court's imposition of liability for injuries to a longshoreman under 33 U.S.C. § 905(b), based on the *Scindia* duty to intervene. Finding no basis to impose liability on the shipowner, we reverse and render.

I.

Lionel Singleton, a longshoreman employed by Cooper/T. Smith Stevedoring Company, Inc. ("CTS"), was severely injured while offloading zinc and aluminum ingots from the aft hold (Hold 1) of the M/V MA GUAN HAI. The vessel was owned by Guangzhou Ocean Shipping Company (GOSCO"), an instrumentality of the government of the People's Republic of China, time chartered to Pacific Basin Shipping and Trading Company, Ltd., and sub-time chartered to Eurosteel Lines, Inc. ("Eurosteel").

The M/V MA GUAN HAI docked in New Orleans on June 1, 1988, was carrying primarily a cargo of steel, but also zinc and aluminum ingots. CTS had been retained by Eurosteel to offload the ingots from Hold 1. After inspecting the holds and cargo and finding no deficiencies or dangerous conditions, CTS began unloading on June 2, 1988, using the ship's winch to lift the ingot bundles up through the hatch.

Lionel Singleton was injured on the morning of June 3, 1988. While he was standing on top of a tier of ingots attaching a winch sling to a bundle, the tier under him collapsed. Singleton was thrown to the deck and crushed under the falling bundles.

Singleton sued GOSCO and Eurosteel in state court and the suit was removed to the federal district court. CTS intervened seeking reimbursement pursuant to the LHWCA, 33 U.S.C. § 901, *et. seq.*, of all compensation and medical benefits paid to Singleton as a result of this accident. Before the trial, Singleton settled with Eurosteel.

Following a bench trial, the district court found that GOSCO was not liable under the first *Scindia* duty, the turnover duty. *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156, 167, 101 S.Ct. 1614, 1622, 68 L.Ed.2d 1 (1981). Based on expert testimony, the court concluded that the ingots were loaded, stowed, dunnaged and secured within the range of skilled and competent stevedoring practices and that the ingots arrived in New Orleans "securely intact, presenting no latent defect in the stow that a competent stevedore could not identify and cope with."

The court further found that the instability of the ingot tier which caused Singleton's fall was due to the faulty unloading procedure used by CTS. Because the stow was located forward of the hatch, the bundles to be unloaded in the sling were pulled off the tiers by the winch wires at an angle. This dragging of the bundles off the interior, unsupported tiers sent vibrations through the tiers, which destabilized the interior tiers and directly caused the tier collapse which injured Singleton. The court concluded that "CTS imprudently elected to unload with the quicker but riskier crane wire, and with forklifts inadequate to the task" and that this manner of unloading was "haphazard, unsafe, geared to productivity, and set the stage for Singleton's accident."

The district court, however, did find GOSCO liable for breach of the third *Scindia* duty, the duty to intervene. *Id.* at 175-76, 101 S.Ct. at 1626. The court found that Yu, the first officer and agent of the ship, knew of the unsafe unloading procedures of CTS and had a duty to intervene to stop a hazardous activity "being promoted by the obviously improvident judgment of the stevedore, as well as by the stevedore's use in a hazardous or 'defective' manner of

equipment actually belonging to the vessel: the crane between the No. 1 and 2 holds."

The district court allocated fault 15% to GOSCO, 75% to CTS, and 10% to Singleton. CTS's fault was reallocated to GOSCO under the rationale of *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979). This increased GOSCO's share of the damages to 90%. Judgment was entered in favor of Singleton against GOSCO for $1,340,634.52, together with prejudgment interest at the Louisiana legal rate and postjudgment interest under 28 U.S.C. § 1961.

GOSCO filed a timely appeal and complained primarily of the finding of liability under the third *Scindia* duty. Singleton cross-appealed and challenged a factual finding by the district court. Our disposition of this appeal makes it unnecessary for us to consider Singleton's cross-appeal.

II.

[1,2] In *Scindia,* the Supreme Court held that generally the shipowner may rely on the stevedore to avoid exposing the longshoreman to unreasonable hazards and that the primary responsibility for the safety of the longshoremen rests on the stevedore. *Scindia,* 451 U.S. at 172, 101 S.Ct. at 1624. The Supreme Court described three limited circumstances in which the shipowner would be liable to the longshoremen. These three *Scindia* exceptions were summarized by this court in *Pimental v. LTD Canadian Pacific Bul,* 965 F.2d 13 (5th Cir.1992):

> 1) if the vessel owner fails to warn on turning over the ship of hidden defects of which he should have known.
>
> 2) for injury caused by hazards under the control of the ship.

> 3) if the vessel owner fails to intervene in the stevedore's operations when he has actual knowledge both of the hazard and that the stevedore, in the exercise of "obviously improvident" judgment, means to work on in the face of it and therefore cannot be relied on to remedy it.

Id. at 15 (citations omitted).

The dispositive question presented in this appeal is whether the district court erred in concluding that the shipowner was at fault for failing to intervene under (3) above.

[3] Our cases make it clear that the shipowner's duty to intervene under *Scindia's* third exception is narrow and requires "something more" than shipowner knowledge of a dangerous condition.

> To impose a duty to intervene on the shipowner, respecting dangers nor created by it which are obvious to the stevedore's employees and arise during and in the area of the stevedore's operations, something more is required than the mere shipboard location of the dangerous situation and the shipowner's knowledge of it.

Futo v. Lykes Bros. Steamship Co., 742 F.2d 209, 215 (5th Cir. 1984). *See also Casaceli v. Martech International, Inc.*, 774 F.2d 1322 (5th Cir.1985), *cert. denied*, 475 U.S. 1108, 106 S.Ct. 1516, 89 L.Ed.2d 914 (1986).

[4] The district court found that the defective unloading procedure adopted by CTS created the dangerous condition that in turn caused Singleton's injury. This is fully supported by the record. CTS did not follow the proper procedure of moving the bundles of ingots directly under the hatch with a

forklift before lifting the bundles directly out of the hold. Instead it used the ship's winch to drag the bundles at an angle off the tiers located forward of the hatch. This destabilized the interior tiers and led to the collapse of the tier.

The district court found that the shipowner knew of the dangerous condition CTS had created in the hold. Although GOSCO challenges this finding, we conclude that it is not clearly erroneous.

As we have stated in a number of decisions, however, the duty of the shipowner to intervene under *Scindia* cannot be established by simply proving that the shipowner knew of a dangerous shipboard condition created by the stevedore in its loading or unloading operations. Proof of "something more" is required. Singleton argues that he satisfied this additional element in this case by establishing that CTS personnel used the ship's winch to implement its defective unloading procedure. Singleton agrees that the winch had no defects that contributed to this accident.

CTS's use of the non-defective ship's winch does not satisfy the requirement that the injured longshoreman demonstrate something more than the shipowner's knowledge that the stevedore has created a dangerous condition in its loading or unloading operations. The ship turned a non-defective winch over to the stevedore to use in the stevedore's unloading operations. Whether the winch belonged to the ship or the stevedore, the shipowner was entitled to assume that the stevedore would use the winch properly. Thus, the ship's ownership of the non-defective winch in this context is legally inconsequential relative to the ship's duty to intervene. Consequently it does not provide the

"something more" the longshoreman must establish to visit liability on the ship under *Scindia's* third exception.

We reached a similar result in a closely analogous case, *Williams v. M/V SONORA,* 985 F.2d 808 (5th Cir.1993). In *Williams,* a longshoreman was injured while loading unstripped pipe, an operation known to be dangerous by both the stevedore and the shipowner. The shipowner initially refused the load of pipe because it arrived unstripped on the trucks. As in this case, the stevedore was using the ship's winch to load the pipe and the shipowner had knowledge of the dangerous procedure. We concluded that the shipowner had no duty to intervene unless some element of shipowner control over the dangerous procedure or some involvement of a "defective" ship appurtenance was present. *Id.* at 812. *See also, Hunter v. Intreprinderea de Explore Flott Maritime Navrom,* 868 F.2d 1386, 1388 (5th Cir. 1989); *Casaceli,* 774 F.2d at 1327.

III.

For reasons stated above, we conclude that the district court erred in determining that GOSCO had a duty to intervene in CTS's unloading operation. The judgment in favor of Singleton is therefore reversed and judgment is rendered in favor of GOSCO.

REVERSED and RENDERED.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

LIONEL SINGLETON, SR.	CIVIL ACTION
VERSUS	NO. 90-5063
GUANGZHOU OCEAN SHIPPING COMPANY AND EURO-LINE COMPANY	SECTION "I" (2)

FILED
NOV 8 94

AMENDED JUDGMENT

Considering the Court's Findings and Conclusions entered herein on September 21, 1994, and its Amended Order entered October 5, 1994, and its Second Amended Order entered this date, the first Judgment entered on October 5, 1994 is accordingly hereby AMENDED and SUPERSEDED to read as follows:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Lionel Singleton, Sr. and against defendant, Guangzhou Ocean Shipping Company, in the amount of One Million, Three Hundred Forty Thousand, Six Hundred Thirty-four dollars and Fifty-two cents ($1,340,634.52), together with prejudgment interest at the Louisiana legal rate of interest from the date of judicial demand, and post-judgment interest pursuant to 28 U.S.C. § 1961.

DATE OF ENTRY NOV 08 1994

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Lionel Singleton, Sr. and Guangzhou Ocean Shipping Company pay to the intervenor, Cooper/T. Smith Stevedoring Company, Inc. out of preference and priority from the total award to Lionel Singleton, Sr. of One Million, three Hundred Forty Thousand, Six Hundred Thirty-four dollars and Fifty-two cents ($1,340,634.52) the amount of Seventy-One Thousand, One Hundred Twenty-two dollars and Ninety-seven cents ($71,122.97) plus post-judgment interest pursuant to 28 U.S.C. § 1961, representing the compromise concerning compensation payments entered into between Lionel Singleton, Sr. and Cooper/T. Smith Stevedoring Company, Inc. on Febaruary 28, 1994.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the cross-claims filed by defendant, Guangzhou Ocean Shipping Company, against defendants, Eurosteel Lines, Inc. and Assuranceforengen Gard, are dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that ten percent (10%) of the costs be borne by the plaintiff, Lionel Singleton, Sr., and ninety percent (90%) of the costs be borne by the defendant Guangzhou Ocean Shipping Company.

New Orleans, Louisiana this 7th day of November, 1994

/s/ Henry A. Mentz

UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

LIONEL SINGLETON, SR.	CIVIL ACTION
VERSUS	NO. 90-5063
GUANGZHOU OCEAN SHIPPING COMPANY AND EURO-LINE COMPANY	SECTION "I" (2)

FILED
SEP 20 '94

FINDINGS AND CONCLUSIONS

On June 3, 1988, the M/V MA GUAN HAI was owned by defendant Guangzhou Ocean Shipping Company (GOSCO), an instrumentality of the government of the People's Republic of China, a sovereign nation, The vessel was time chartered to Pacific Basin Shipping and Trading Company, Ltd.,[1] and sub-time chartered by Pacific Basin to Eurosteel Lines, Inc. (Eurosteel).[2] These two charters were

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[1] Pacific Basin was dismissed without prejudice early on in the litigation.

[2] On the eve of trial, Eurosteel and its protection and indemnity underwriter, Assuranceforeningen Gard, settled their potential exposure to plaintiff in the amount of $350,000. Included in the settlement was a settlement by the compensation intervenor, Cooper/T. Smith, which agreed to waive 40% of its compensation lien, reserving the right to collect 60% of its compensation lien from plaintiff should he prevail at trial.

in force and effect on the date of the accident at issue.

On June 3, 1988, plaintiff Lionel Singleton, Sr. (Singleton) was a union employee working for Cooper/T. Smith Stevedoring Company (CTS) in the discharge of cargo from the MA GUAN HAI. Singleton had been a member of the longshoremen's union, Local ILA 3000, since 1974.

The MA GUAN HAI (the vessel) is a DW 41,000 MT type bulk carrier, which has five cargo holds, the forward-most hold being referred to as Cargo Hold No. 1. The vessel has four cranes located on the deck of the ship, one each between the five cargo holds.

Singleton, a resident of New Orleans, was injured while discharging a cargo of bundled aluminum and zinc ingots (the ingots), which were stowed in the forward portion of the vessel's Hold No. 1.

Singleton sustained severe and permanent injuries when the ingots he was standing upon collapsed and fell on him.

Singleton brought this suit pursuant to Section 905(b) of the Longshore and Harbor Workers Compensation Act, 33 USC § 901, *et seq.*[3] which provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel. . .

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[3] Plaintiff's personal injury claim against GOSCO was slated for non-jury determination pursuant to the Foreign Sovereign Immunities Act (FSIA), 28 USC §1602, *et seq.*

Singleton specifically contends that GOSCO is liable to him for his injuries due to its negligence with respect to the loading and securing of the vessel's cargo of ingots and/or for its failure to intervene after the unloading of the ingots by CTS had commenced.[4]

Having reviewed the law, pleadings, memoranda, exhibits, and extensive testimony at trial, the Court makes the following findings of facts and conclusions of law. To the extent that any of the following findings of fact are legal in nature, they are incorporated herein as conclusions of law, and to the extent that any of the legal conclusions recited below contain factual findings, they are adopted as such.

A. *The Time Charter*

The Time Charters in effect were a standard "Government Form" approved by the New York Produce Exchange since 1946, with certain additions and deletions made by the parties.

The relevant language of the Eurosteel Time Charter in effect at the time of the accident is contained in Clause 8 as follows, with the deviations by the parties from the standard language underlined:

> That the Captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with ship's crew and *equipment.* The Captain (although appointed by the

[4] These instances of vessel negligence are referred to as the first and third exceptions of *Scindia Steam Nav. Co., Ltd. v. De Los Santos,* 451 U.S. 156, 167 (1981) to be discussed below.

> Owners), shall be under the orders and directions of the Charterers as regards employment and agency: and Charterers are to load, *arrange and pay for loading, trimming, stowing, discharging, weighing, tallying and delivery of cargoes, surveys on hatches and any other survey on cargo except as per Clause 78,* under the supervision *and direction* of the Captain, who is to sign *or is to authorize Charterers' agents to sign if so requested by Charterers* bills of Lading for cargo as presented, in conformity with *signed* Mate's receipts.

Clause 78 was added as an amendment and provided in part that:

> *Should steel cargo be carried, Owners have right to conduct pre-loading and discharging surveys by surveyors appointed by Owners' P&I Club, such expenses to be for Owners' account but Charterers and their agents to render best assistance/co-operation to surveyors.*

B. *Preparation for and the Loading of the Ingots*

Prior to loading the cargo aboard the vessel, a cargo stowage plan, or a "blueprint" which indicates in which hold the cargo will be placed, was prepared by a port captain employed by time charterer Eurosteel. The stowage plan indicated that the ingots destined for New Orleans were to be loaded in the forward section of Hold No. 1.

Hold No. 1 is closest to the bow of the vessel and has a different shape from the other four holds. To accommodate the shape of the bow, the sides of Hold No. 1 expand outward

from the forward bulkhead, making the hold wider in its aft-most area. Despite the converging "V" shape of the bow, the forward bulkhead itself is straight port to starboard, vertical from top to bottom and parallel to the opposite and wider wall of Hold No. 1. Unlike the forward bulkhead and the aft-most wall, the sides of Hold No. 1 are not vertical, but rather flare outward from the floor. Thus, rather than square-shaped and more amenable to storage, Hold No. 1 forms something of a trapezoid with its coverging sides flaring outward and its parallel "walls" both vertical, though of different lengths.

Hold No. 1 was entered either by a ladder extending down the center of the forward bulkhead, which required a person to walk on the top of the stow, or by sling lowered through the hatch by a crane.

Loading the ingots in the forward section of Hold No. 1 was appropriate. Compared to the other cargo carried by the vessel, the exceptionally hardy ingots were the least valuable, the least susceptible to damage from "pounding"[5] or otherwise, and the most manageable in terms of size and shape to conform with the configuration of Hold No. 1.

At the request of Eurosteel's port captain and to insure seaworthiness during the Transatlantic voyage, the vessel's chief officer Yu Jia Hua (Yu) calculated the vessel's draft assuming it to be loaded according to the port captain's stowage plan and determined the plan to be safe in that respect.

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[5] "Pounding" is an expression used to describe the repeated blows to the bow of a vessel encountering bad weather and rough seas.

Eurosteel hired Hessantie-Neptunus, N.V. (Hessanatie)[6], an independent stevedoring company, to load the ingots onto the vessel in Anatwerp, Belgium.

C. *Actual Loading of the Ingots*

The stowage plan for the M/V MA GUAN HAI indicates where the cargo was to be loaded on the vessel, not the method or manner of stowage. Hessanatie as independent stevedores implemented the stowage plan and loaded all cargo in Antwerp.

The Court received neither eye-witness testimony, nor testimony based on relevant documentation with respect to how the ingots were actually loaded by Hessanatie in Antwerp.[7]

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[6] Hessanatie is outside the jurisdiction of this Court and was not a named party to this lawsuit.

[7] GOSCO went to great lengths at trial to attempt to establish the manner in which the cargo was loaded at Antwerp. Through its experts William Hagerzieker and George Duffy and reference to photographs of the ingots at various stages of unloading, GOSCO contended that three layers of ingots were laid out on the floor with wood dunnage covering each layer to prevent shifting during voyage. Dunnage is loose materials placed within the cargo specifically to keep it from shifting. Tread plates were laid upon this base of three layers, GOSCO opined, and forklift machines were lowered onto the tread plates. Tread plates are steel sheets which allow for displacement of the weight of forklifts or workers on top of the cargo. The wings, or sides, of the hold and the forward areas not directly under the hatch opening, were then loaded by forklift.

According to GOSCO, this accounted for the difficulty faced by the offloading stevedores to insert their forklifts under the bundles, because the bundles above layer three were loaded sideways rather than head on facing the bulkhead, resulting in the openings in which to insert the forks being accessible only from the side. Dunnage was placed athwartship

Chief Officer Yu observed the ingots being loaded, inspected the cargo, and testified by deposition that he was satisfied with the loading and securing of the cargo.

Once the cargo was loaded in Antwerp, on April 28, 1988, the captain of the vessel as master signed two separate certificates to Hessanatie which stated that the loading and securing of the vessel had been "executed in accordance with our indications and to our entire satisfaction."[8]

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footnote 7 continued

(side by side) between the added layers, and "chocking", or wooden blocks or framing, was placed between the sides of the vessel and the bundles placed along the sides. The chocking in effect "squared off" the hold, facilitating the use of its coverging forward space and preventing movement of the cargo.

Last, according to GOSCO, the forklifts and tread plates were removed and the center bundles loaded by sling directly under the square of the hatch. Throughout the stow, the cargo was further secured by steel bands and wires, or lashings. It is GOSCO's contention that CTS and Singleton were negligent in not reversing this loading pattern. GOSCO's theory is based in part on its contention that half of the ingots were stowed directly under the hatch, which contention was hotly disputed by Singleton.

Apart from the precise location of the bundles under the hatch, the Court tends to agree with GOSCO's theory but elects to treat it as such rather than a finding of fact. The precise manner of loading the ingots is not necessary to the Court's ruling herein. Furthermore, the ingots could have been safely unloaded without reversing any particular loading pattern had CTS taken precautions to prevent the remaining cargo from falling as required by 29 CFR § 1918.83.

[8] The parties would embroil the Court in a determination of whether "our" in the quoted language of the certificate refers to GOSCO or Eurosteel, but such a determination is unnecessary to the Court's ruling. See footnote 28.

D. *The Voyage*

The vessel sailed from Antwerp to Brake and Bremen, Germany for further loading of steel products. Thereafter, it sailed on its Transatlantic crossing where it experienced a 24 hour period of Force 7-8 gale force winds, not uncommon for such a crossing. The vessel's crew made no mention of the storm to CTS.

The vessel unloaded cargo in the ports of Port Everglades, Tampa and Mobile prior to sailing to New Orleans. In Tampa, the cargo of steel coils stowed just aft of the bundled zinc ingots was unloaded, leaving exposed and free-standing the stow of zinc ingots and slabs. However, the stow remained intact as discussed below during the coastwise voyage from Tampa to Mobile and from Mobile to New Orleans.

The vessel arrived at the Napoleon Avenue "B" wharf in New Orleans at 4:35 P.M. on June 1, 1988. Previously ordered labor was cancelled due to rain shower activity[9].

E. *General Description of the Stow*

The ingot bundles weighed at least a thousand (1000) pounds each with the smaller ones measuring two feet eleven and 1/2 inches by one foot six inches by one foot five inches (2'11 1/2" X 1'6" X 1'5")[10], according to GOSCO's P and I,

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[9] Survey Report of Captain Coumou, Plaintiff's exhibit 19.

10 The Court can not be sure if these are the measurements of the smaller bundles or the larger ones, but a reasonable assumption is these were the smaller bundles as the measurements come from the handwritten notes of Captain Coumou taken at the time of the accident (Plaintiff's exhibit 20).

surveyor Captain Coumou.

The stow measured thirteen and a half (13 1/2) feet in depth and close to twelve (12) feet in height, a height neither unsafe nor uncommon for experienced longshoremen unloading steel products.

There were no more than nine tiers of bundled ingots counting from the forward bulkhead to the outermost tier of the stow.[11] A determination of the number of layers of bundles is more difficult as the bundles in the first two outermost tiers were larger than those in the interior seven tiers.

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footnote 10 continued

However, it is apparent from Defendant's photograph exhibit 2P taken at 3:30 P.M. the day before the accident, that the first two tiers of the larger bundles had already been unloaded by 3:30 P.M., except for what GOSCO counsel appropriately referred to as the "Leaning Tower of Pisa" staircase of bundles on the starboard side used by the longshoremen to climb up onto the stow.

Since all but a few of the larger bundles were unloaded by the time of the accident the next morning, the Court concludes that Coumou more likely than not measured one of the smaller bundles that fell on or near Singleton when the tier he was standing on collapsed.

[11] Throughout the trial there was little consistency on the part of counsel or the various witnesses in their use of the words "row", "tier", and "layer." In an attempt to avoid the resulting confusion from such interchangeable treatment of these words, the Court shall in each instance use the word "tier" to refer only to a vertical row running from port to starboard.

The word "layer" shall refer to an entire horizontal row or layer of bundles, such as the first layer of bundled ingots which rested on the floor of the hold.

The word "row" will be used as infrequently as possible, due to its possible application as either a layer or a tier, although when used its meaning should be clear from the context.

This apparently resulted in there being six (6) horizontal rows (port to starboard) of larger bundled ingots in the first two outermost cross-dunnaged tiers, with six long slabs stowed across the top of the two tiers where the tiers extended into the wings. By contrast, due to the smaller size of the bundles and there being no slabs stored in the interior of the stow, there were eight (8) horizontal rows (port to starboard) of smaller bundled ingots in the interior seven tiers.[12]

Of particular importance the Court finds there were at most two tiers and more likely than not, no tiers directly under the hatch of Hold No. 1.[13] The Court further finds Captain Coumou mistaken in his contention that discharge of bundles from under deck occurred only after he departed

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[12] Thus the Court notes there was cross-dunnage between the top two layers (the 5th and 6th) of the outermost two tiers, and no dunnage between the top two layers (the 7th and 8th) of the smaller bundled interior tiers.

[13] This presumes a depth of a foot and a half to each tier, of which there were nine, or approximately 13 1/2 feet total depth of the stow. (This depth coincides with GOSCO expert Hagenzieker's calculations and reflects the measurement of the bundles noted by Captain Coumou.) Testimony at trial established the distance between each rib (as opposed to reinforcement rib) to be 31 inches and the hatch commencing at the 6th rib of the hold. (These figures were evident from Plaintiff's Exhibit 18, the blueprint of the ship, and from the various photographs. The court notes in particular that two tiers of bundles fill the space between two ribs.) Multiplying 6 ribs by 31 inches results in 186 inches or approximately 15 and 1/2 feet from the forward bulkhead to the hatch opening, whereby no tiers would be under the opening of the hatch. However, allowing for error and assuming instead that each tier was two feet in depth, rather than a foot and a half, results in a total depth of the stow of eighteen feet with at most two tiers extending out under the hatch. Despite the optical illusion of GOSCO's photograph exhibits 2J and 2K, the Court finds the first calculation to be the more likely.

the vessel at 3:00 P.M. on June 2nd.[14]

F. *The Condition of the Bundled Ingots upon Arrival in New Orleans*

There were over fourteen original photographs taken of the stow, which were cropped, blown-up and introduced as exhibits at trial. These photographs showed the condition of the ingot stow prior to discharge, during discharge, and after the accident occurred. Some were taken on deck through the hatch-opening above Hold No. 1, while the rest were taken from the floor of the hold itself. They were taken either by Captain Coumou, GOSCO's P&I surveyor; Captain Donald Thompson and/or Roger Smith, surveyors for CTS; or Vincent Lampo, CTS ship superintendent.

It is apparent from the photographs taken prior to discharge and during the early stages of discharge that the stow of ingots crossed the Atlantic Ocean and arrived in New Orleans on June 1, 1988 still soundly and securely intact[15]. Although some settling is apparent, it is plain to the naked eye that the vast majority of bundles of the aft or outermost tier rest parallel to the floor, including those stowed in the wings, and more importantly, the outermost tier itself stands perpendicular to the floor, indicating no tilting of the top layers toward the stern of the boat or "outward bowing" towards the hold, of the stow in the wings or otherwise.

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[14] Compare GOSCO's Photograph Exhibit 2P taken June 2nd thirty minutes after Coumou's departure showing only 4 and perhaps 5 full tiers still remaining in the hold.

[15] See Plaintiff's Exhibit 2, 4 and 5; Defendant's Exhibits 1B, 1C, 1E, 1M, 1Q, and particularly 2A, taken on the morning of the 2nd before discharge began.

Also apparent to the naked eye from the deck of the vessel before discharge were (1) at least three variations in size of the bundles and slabs that were stowed[16]; (2) the existence of wooden "chocking" in the wings to "square off" the stow; (3) fore-and-aft and athwartship wooden dunnage[17] between each layer of the outermost tier; (4) steel bands and wires, or lashings, securing the stow throughout; and (5) additional stabilizing of the bundles on the top layer, by wood chocking wedged between each bundle by hammer to prevent forward-aft and athwartship movement.

G. *The Condition of the Stow as Discharge Proceeded*

Not apparent *from the deck* before discharge was the fact that the forward-aft and athwartship dunnage, or cross-dunnaging of the two outermost tiers that "locked in" the stow, ceased at the third outermost tier resulting in only athwartship dunnage from the 3rd tier forward to the bulkhead.[18] Also initially unapparent from the deck was that some of the wooden chocking used to "square off" the stow in the flared wing areas was not nailed, nor was there dunnage whatsoever between the interior 7th and 8th layers

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[16] The larger bundles and the slabs were located in the outermost portion of the stow, with the smaller bundles inside toward the forward bulkhead.

[17] Zinc ingots are metal, and metal against metal is more likely to slip than metal against wood.

[18] The exterior bundles were stablized by cross dunnaging, a procedure impractical if not impossible in the interior of the stow. See GOSCO's exhibit 2G and 2I to visualize the difficulties of loading were the fore-and-aft dunnaging extended from the bulkhead all the way to the outermost tier. The dunnage would be sticking out at the longshoremen and their forklifts as they attempted to slide the bundles in between the dunnage.

of the smaller bundles.

As evidenced by the photographs,[19] these conditions and the "bowing outward" in the wings of the stow became readily apparent to even the untrained eye from the deck and below, as discharge proceeded throughout June 2nd, the day before the accident.[20]

H. *The Discharge Process on June 2nd*

On June 2, 1988, the Cooper/T. Smith ship superintendent, Vincent Lampo, arrived at the vessel for the first time at approximately 7:00 A.M. Previously ordered labor had been cancelled the day before due to late afternoon rain shower activity. Lampo had one hour in which to assess the cargo of five holds, and direct his men and equipment. As is customary, the crew of the MA GUAN HAI opened the vessel's cargo hold hatches and turned the work area over to CTS.

Upon Lampo's arrival and prior to his initial inspection of the cargo, the equipment to be used by CTS was already on location at the dock. This equipment did not include fork extenders or a triple masts forklift, which would have enabled the longshoremen to safely unload the bundles from the wing and which CTS had in its inventory.

Greg Miller, senior steel superintendent for CTS at the

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[19] Eg. Plaintiff's exhibits 7,8,9,10,11, and 12

[20] See GOSCO photograph exhibit 2A, taken at 8:00 A.M., exhibit 2B taken approximately mid-morning, and exhibit 2P taken at 3:30 P.M., all on the 2nd of June, 1988.

the time, was also aboard the vesssel. His testimony established that CTS was hired by Eurosteel, and that he or CTS vice-president Henry Eisenberg was in daily communication with Eurosteel during the unloading. He did not recall discussing the onloading procedure with Eurosteel or any problems as to improper stowage.

Neither Miller or Lampo entered Hold No. 1 on June 2nd or June 3rd prior to the accident.

As the offloading stevedore, CTS unloaded cargo from the vessel, including the slabs and the bundled ingots, for eight hours the first day without incident. Present at intermittent times during the discharge were marine surveyors hired by various interests.

Representing CTS were Captain Donald Thompson and Roger Smith, who observed in their notes for the 2nd of June that there was a "problem with production" due to "lots of dunnage" making the cargo "difficult to unload".

Captain Bram Coumou was hired by the vessel's protection and indemnity insurer to perform a cargo outturn survey on a non-continuous basis, meaning upon initial opening of the hatches and later during periodic spot checks. In the exercise of his duty to document the condition of the cargo prior to discharge and to record damages to the cargo inflicted by the offloading stevedore[21], Coumou observed the longshoremen "ripping the tiers" by using the crane wire to drag the ingot bundles under deck across the stow. He commented to that effect to the vessel's Chief Officer Yu.

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[21] See previously mentioned Clause 78 of the Eurosteel Time Charter.

By 3:00 P.M. when Captain Coumou departed the vessel for the day, the longshoremen were clearly unloading bundles in the wings and forward of the hatch, and in fact had been doing so since mid-morning.[22]

I. *The Accident on June 3rd*

On the morning of June 3rd, forty-six year old Lionel Singleton entered Hold No. 1 by the ladder attached to the middle of the forward bulkhead, as he had the day before.[23] He walked across the remaining few tiers of bundles on the starboard side of the hold, and down the makeshift "stairs" constructed of graduated bundles to the floor.[24]

Singleton testified at trial that he climbed back to the top of the stow the way he came down. This testimony contrasts with his deposition testimony two years earlier, when he stated he was lifted part way up the stow by standing on the blades of a forklift, and climbed the remaining way to the top on the cargo itself.

Singleton nevertheless reached the top and positioned himself near the port side of the fourth tier from the front bulkhead, now the outermost tier due to the previous day's progress unloading. One of the Hunter brothers working the hold with him, threw him a sling wire to hook the first bundle of the day to the crane's wire.

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[22] See GOSCO photograph Exhibit 2P, taken at 3:30 P.M. June 2.

[23] See GOSCO photograph Exhibit 2A of Singleton on top the stow at 8:00 A.M. June 2 before discharge began.

[24] See GOSCO photo exhibit 2C, 2d and 2E.

While attempting to pass the sling wire behind and under a bundle, and to reach in front of the bundle with a hook to grab the wire's looped end, Singleton fell to the floor, when the tier he was standing on suddenly collapsed.

Plaintiff Lionel Singleton suffered severe injuries, particularly to his lower body which was crushed by bundled ingots falling on top of him. He received immediate attention from his co-workers in the hold and was transported to Touro Infirmary for medical assistance. He never lost consciousness.

J. *The Scindia Duties*

GOSCO as the vessel owner would be held liable to Singleton for damages under the first and third exceptions outlined in *Scindia Steam Nav. Co., Ltd. v. De Los Santos,* 451 U.S. 156, 101 S. Ct. 1615, 68 L.Ed. 2d 1 (1981),

> (1) if the vessel owner failed to warn on turning over the ship of hidden defects of which the owner should have known; ... [or]
>
> (3) if the vessel owner failed to intervene in the stevedore's operations when the owner has actual knowledge both of the hazard and that the stevedore, in the exercise of "obviously improvident" judgment, means to work on in the face of it and therefore cannot be relied on to remedy it.

Randolph v. Laeisz, 896 F.2d 964, 970 (5th Cir. 1990).

K. *The First Scindia Exception*

Based on its findings herein, the Court concludes that

GOSCO is *not* liable to Singleton under the first *Scindia* exception.

After considering the testimony of GOSCO's eminently qualified stevedoring experts, George Duffy[25] and William Hagenzieker[26], and scrutinizing the photographic exhibits, the Court concludes the bundled ingots were professionally loaded, stowed, dunnaged and secured at Antwerp, and the method and condition of the dunnage and chocking were within the range of skilled and competent stevedoring practices.

The Court concludes that bundled ingots arrived in New Orleans safely, soundly, and securely intact, presenting no latent defect in the stow that a competent stevedore could not identify and cope with.

By so determining the Court also finds no fault or liability to Singleton on the part of Eurosteel or Hessanatie with respect to the loading of the bundled ingots in Antwerp.

The Courts conclusions are supported by the fact that CTS did not request additional compensation from Eurosteel for unloading an improper stow as its customary, and likewise, no mention of improper storage was noted on CTS's daily vessel activity log.

From the photographs it is apparent to the Court's

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[25] Duffy was originally called as an expert by Eurosteel which settled with Singleton immediately prior to trial.

[26] Captain Claude Davenport, who testified on behalf of Singleton, was accepted by the Court as an expert marine surveyor, but specifically not as an expert in stevedoring. Davenport's sailing experience ended in 1955.

untrained eye that the alleged "defects" in the stow were open and obvious, particularly to a stevedore "reasonably competent in the performance of his work." This is especially true with respect to the allegedly hazardous location of the bundles forward under deck, albeit vehemently disputed, but nevertheless patently obvious upon first opening the hatch of Hold No. 1.

In the recent decision of *Howlett v. Birkdale Shipping Co., S.A.* 1994 WL 249547 (1994), the Supreme Court refined the first *Scindia* duty stating that:

> The vessel's turnover duty to warn of latent defects in the cargo stow and cargo area is a narrow one...
>
> Most vessels take responsibility, for instance, for preparing a stowage plan, which governs where each cargo will be stowed on the ship. *But it is the stevedore, an independent contractor hired for its expertise in the stowage and handling of cargo, that is charged with actual implementation of the plan.* To impose a duty upon vessels to exercise scrutiny over a cargo loading operation to discover defects *that may become hidden* when the stow is complete would require vessels to inject themselves into matters beyond their ordinary province...
>
> Any hazard uncovered by a shipowner who inspects a completed stow would, as a matter of course, be discovered in a subsequent port by a stevedore "reasonably competent in the performance of his work."...*[S]hipowners engage a stevedore for its expertise in cargo operations and are entitled to assume that a competent stevedore will be able to identify and cope with defects in the stow.* Once loading

> operations are complete, it follows that any dangers arising from an improper stow would be "at least as apparent to the stevedore as to the shipowner." (Emphasis added)

Thus, with respect to the unnailed chocking, the cross-dunnaging only on the outermost two tiers, and the lack of dunnage between the interior seventh and eighth layers, these would have been obvious to CTS superintendents Lampo and Miller *before discharge,* had they conducted their inspections from within Hold No. 1 rather than from on deck, as they did. Furthermore these conditions became obvious even from the deck *as discharge proceeded.* The Court notes that none of these conditions remotely approach the latent defect of *Howlett,* which dealt with debris-covered clear plastic provided by the vessel and improperly covering the floor to which plaintiff jumped and injured himself.

In the instant case, without the existence of any of these allegedly "defective" conditions, and certainly upon discovery of even one, a competent stevedore, unlike CTS here, would refrain from dragging bundles across the top of the stow, "breaking out" the stow by eating piecemeal into its center, and "bouncing" bundles down the side walls clearly evidenced by arch marks on the side walls,[27] which undermined the stow and contributed to its instability and "outward bowing" in the later states of discharge.

In addition, upon viewing the location and positioning of the bundles, a competent stevedore, unlike CTS here, would have questioned Eurosteel on the pattern of loading,

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[27] See GOSCO's photograph exhibit 1A, 1F, 2F and 2G.

insisted the longshoremen on top the stow wear safety belts, and complied with 29 CFR § 1918.83 *Stowed cargo, tiering and breaking down,* which provides:

> (a) When necessary, cargo *shall* be secured or blocked to prevent its shifting or falling.
>
> (b) In breaking down, precautions *shall* be taken, when necessary, to prevent the remaining cargo from falling. (Emphasis added)

The Court concludes that the bundled ingots were properly and professionally stowed and the alleged "defective" conditions in the stow were open and obvious to a layman, all the more so to a competent stevedore. The Court finds that given the testimony of their prevalence in the trade and the safe and sound condition of the stow having crossed the Atlantic and tied up at three ports, some unnailed chocking, no dunnage between the interior seventh and eighth layers, and cross-dunnage only on the two outermost tiers are not *per se* "latent" or "defective."

GOSCO was "entitled to assume that a competent stevedore [such as one would expect the largest in New Orleans to be] would be able to identify and cope with defects in the stow." This applies particularly to the bundles stored under deck. Stevedores are confronted with this everday. CTS imprudently elected to unload with the quicker but riskier crane wire, and with forklifts inadequate to the task.

The Court finds that the manner in which CTS executed the unloading was haphazard, unsafe, geared to productivity

and set the stage for Singleton's accident.[28] GOSCO did not violate the first *Scindia* duty.

See *Riggs v. Scindia Steam Navigation Company*, 8 F.3d 1442, (9th Cir. 1993); 114 S.Ct. 2701 (1994), in which the 9th Circuit held that a vessel's turnover duty of safe condition extends to concealed cargo hazards created by foreign on-loading stevedores. The cargo in *Riggs* was bundled pipe "stowed without dunnage (loose materials placed within the cargo to keep it from shifting) or shoring (vertical supports)." The Supreme Court vacated judgment of the 9th Circuit and remanded "for further consideration in light of *Howlett v. Birkdale.*"

L. *The Third Scindia Exception*

Based on its findings herein, the Court concludes that

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[28] The Court opines that Singleton is misguided in his contention that Clause 8 of GOSCO's contract and the addition of the work "direction" therein impose a greater turnover duty on GOSCO than that discussed in *Howlett* ("Because there can be no recovery under §5(b) for a vessel's failure to warn of dangers that would be apparent to a longshoreman of reasonable competence, nothing would be accomplished by imposing a duty upon vessels to inspect the stow under completion of cargo operations.") Since the Court finds the conditions complained of in the stow to be open and obvious and not latent defects, it need not reach the question railed by Singleton.

GOSCO's contention citing *American Home Assurance Company v. M/V SLETTER, 1993 WL 543055 (E.D. La. 1993), that Clause 8 shifts responsibility of the onloading to Eurosteel is also misguided. See Woods v. Sammisa Company, Ltd.*, 873 F.2d 842, 856 (5th Cir. 1989), *cert. denied*, 493 U.S. 853 (1990) where the Fifth Circuit found that a standard time charter clause (such as Clause 8 herein) does not shift operational control over cargo operations, and therefore responsibility for the actions of independent stevedores from the shipowner to the time charterer.

See footnote 8.

GOSCO *is* liable to Singleton under the third *Scindia* exception:

> if the vessel owner fails to intervene in the stevedore's operations when the owner has actual knowledge both of the hazard and that the stevedore, in the exercise of "obviously improvident" judgment, means to work on in the face of it and therefore cannot be relied on to remedy it.

Instances of CTS's "obviously improvident" judgment were detailed by the Court in its discussion of the first *Scindia* exception. That CTS intended "to work on" to maintain a certain productivity rate was apparent by its failure to hold safety meetings, shore up the remaining cargo while breaking out the stow, determine how the ingots were loaded and reverse the loading procedure, and stop to get the proper forklifts and fork extenders from its warehouse inventory.

The hazard which proximately caused Singleton's accident and which should have prompted intervention by the vessel owner was the direct offloading by crane of the bundles under deck, particularly those in the wings. Specifically, by using the ship's crane wire to drag the thousand pound bundles across the stow to be lifted at an angle out through the hatch or lowered to the floor, CTS undermined the stability of the stow.By applying this considerable friction to the remaining tiers, CTS ripped the tiers apart with vector forces exacerbated by the angle of the crane wire.

The Court notes that by using the vessel's crane CTS was increasing GOSCO active involvement in the cargo operations underway, whether GOSCO intended it or not.

Citing *United States v. Lykes Bros. Steamship Co., Inc.*, 432 F.2d 1076 (5th Cir. 1970), Singleton would find Captain Coumou an agent of GOSCO hired by the vessel's P & I insurer to perform an cargo outturn survey. The Court finds the relationship between Coumou and the vessel too remote for a principal/agency relationship to exist or be intended.[29] Such is not the case, however, for Chief Officer Yu, second only in command to the Master of the vessel.

Once Coumou brought to Yu's attention that a hazardous activity of this nature, particularly one employing the ship's crane equipment, was underway, Yu became the sole individual on board who had all the data before him to assess precisely how hazardous the direct offloading of the bundles under deck was.

Yu had observed the loading of the cargo in Antwerp; he had inspected the stow from in the hold in Antwerp and after the Force 7-8 gale force winds crossing the Atlantic; he had not told the stevedore of the storm (though such storms were so common in the Atlantic CTS may have assumed one occurred), he could see from the hatch above Hold No. 1 that the stow was beginning to "bow outward," and he was informed by the vessel's P & I surveyor Captain Coumou during the course of the first day of discharge that CTS was ripping the tiers out by dragging the bundles below deck over the

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[29] Singleton's argument here, proffered to impute Coumou's knowledge of the hazardous activity to GOSCO, is too distorted a reach for the Court, not unlike Singleton's contention that the Certificates of Satisfactory Loading and Securing, Yu's observation and inspection of the stow, and his calculations for the stowage plan amounted to "active involvement" of the vessel owner in the onloading of the cargo in Antwerp.

remainder of the stow to be unloaded.[30]

As chief officer of the M/V MA GUAN HAI, Yu was an agent of the vessel owner. At this point Yu had a duty to intervene to stop a hazardous activity endangering the lives of his crew and the longshoremen. The activity was being promoted by the obviously improvident judgment of the stevedore, as well as by the stevedore's use in a hazardous or "defective" manner of equipment actually belonging to the vessel: the crane between the No. 1 and 2 holds.

By the failure of GOSCO's agent, chief officer Yu, to intervene and take corrective action to stop the stevedore from ripping out the tiers of bundled ingots through the use of the vessel's crane wire, GOSCO is liable to Singleton for the damages caused by GOSCO's inaction.

With respect to time charter Eurosteel, CTS superintendent Miller testified he could recall no discussions with Eurosteel regarding improper, unsafe or hazardous cargo

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[30] Coumou testified in his deposition, which testimony was confirmed again at trial, on p. 76 and 77 as follows:

A. On the side, they used wire slings from the sides. I would call that improper because it rips your tier apart...It rips the tier out because you go and pull and you get all kinds of forces because you're dragging it over the rest of the bundles and that was the first day I saw this happening.

Q. And that's what you saw happening in Hold No. 1?

A. That was, for instance, the first day I saw this happening. ([The Court notes this contradicts defendant's repeated contention that Coumou had left the vessel before CTS began unloading under deck forward or to the sides.]

Q. Did you comment upon that practice to the chief officer on the first day?

A. I have made comments definitely. I will have made comments to the chief mate.

conditions.CTS never requested additional compenstion from Eurosteel for discharging improperly stowed cargo. And because Clause 8 of Eurosteel's Time Charter specifically refers to only the *Captain* being "under the orders and directions of the Charterers as regards employment and agency," there is no basis to even argue that Chief Officer Yu's knowledge is imputed to Eurosteel.[31]

The Court finds that time charterer Eurosteel had no actual knowledge of the hazardous condition that arose after turnover of the vessel to CTS and thus is not liable to Singleton under the third *Scindia* exception or on any other basis.

There was no evidence before the Court of non-party Hessanatie's knowledge of or involvement with the bundled ingots after turn over of the vessel to CTS. The Court nevertheless finds no liability of Hessanatie to Singleton in this regard.

M. *Allocation of Fault*

The Court concludes the bundled ingots were professionally loaded, stowed, dunnaged and secured at Antwerp, and the method and condition of the dunnage and chocking were within the range of skilled and competent stevedoring practices.

By so determining, the Court finds no fault or liability to Singleton on the part of non-settling defendant GOSCO, settling defendant Eurosteel, or non-party Hessanatie with

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[31] See also footnote 28.

respect to the first *Scindia* duty and the loading of the bundled ingots in Antwerp. Eurosteel and Hessanatie were also exonerated from fault by the Court with respect to the hazardous condition after turnover involving the ripping out of the tiers through improper use of the ship's crane.

Thus the Court finds no need to allocate the proportionate share of settling defendant Eurosteel's responsibility, mandated by *McDermott, Inc. v. Amclyde,* 979 F.2d 1068 (5th Cir. 1993), 1994 U.S. Lexis 3122 (April 20, 1994), as there was none.

For the reasons discussed at length above, the Court finds unloading stevedore Cooper/T. Smith 75% at fault for the accident that caused plaintiff Lionel Singleton's injuries and defendant Guangzhou Ocean Shipping Company 15% responsible.

Plaintiff Singleton had been a longshoreman for 16 years when the accident occurred. He shares responsibility for 10% of his injuries due to his negligent climbing without a safety belt, up on top a stow which was bowing outward and which he knew had been racked for hours the day before by the dragging of 1000 pound ingot bundles over it. Furthermore he did this before either CTS's foreman, safety man or ship superintendent had inspected the stow for possible shifting due to river traffic or otherwise during the twelve or so hours since the stow had been worked.

However, under *Edmonds v. Compagnie Generale Transatlantigue,* 443 U.S. 256 (1979), reiterated by the Supreme Court in *Amclyde,* liability of a shipowner is not restricted to that proportion of total damages which matched its pro-

portion of fault. The Court is prohibited from reducing a judgment against vessel owner GOSCO by the proportionate fault of an immune stevedoring company such as CTS, and GOSCO must pay all the damages not due to Singleton's own negligence. Thus GOSCO is responsible for 85% of Singleton's damages, which the Court shall now address.

N. *Damages*

Lionel Singleton was hospitalized following the accident at a Touro Infirmary. On admission June 3, he was in critical condition because of genito-urinary injuries and multiple pelvis and leg fractures. He sustained four fractures to his pelvis and severing of his urethra. He also had multiple compound comminuted fractures of the tibias and fibias of both legs, and a fracture of the os calcis heel bone of his left foot.

Singleton was taken to surgery where his urethral injury was repaired by Dr. Ronald Swartz, a urologist, and his leg fractures were surgically repaired by orthopaedic surgeon Russell Grunsten, who placed large rods in both tibias extending from beneath the knee joint to the ankles of both legs.

Plaintiff was hospitalized until July 19, 1988, and following discharge continued to be treated by Drs. Swartz and Grunsten.

Singleton's urethral injury

Because of the extent of Singleton's urethral injury, an indwelling catheter was inserted for over six weeks. Following removal of the catheter, he developed symptoms of

urethral stricture disease, which is scarring of the urethra caused by his injury, and which caused constriction of the urethra inhibiting his ability to urinate.

Dr. Swartz performed urethral dilation procedures on Singleton to stretch the urethral scarring, which, on October 28, 1988, caused Singleton to begin bleeding through his penis. He was again hospitalized at Touro, in shock due to blood loss. An indwelling catheter was again inserted by Dr. Swartz.

Because of the extent of his urethral stricture disease and problems resulting from outpatient treatment, Dr. Swartz hospitalized Singleton in January, 1989, and performed urologic surgery to surgically reduce scar tissue in the urethra.

Subsequently, Dr. Swartz began performing weekly urethral dilation procedures on Lionel Singleton. This caused additional complications, and Singleton was hospitalized again in May, 1989 because of bleeding following dilation. Once again, he required an indwelling catheter.

Thereafter for approximately one year, Dr. Swartz performed weekly urethral dilation procedures, which consist of inserting a tube into his penis to stretch the urethral scarring. The procedures were then performed every two weeks for another year, then three weeks, and for the past several years, Singleton has received urethral dilation therapy on a monthly basis.

Dr. Swartz testified that because of his residual urethral scarring, Lionel Singleton will require monthly urethral

dilation procedures for the rest of his life. Lionel Singleton has a life expectancy from date of trial of 21.3 years.

Singleton's orthopaedic injury

Dr. Russell Grunsten testified that the orthopaedic injuries sustained by Lionel Singleton were life-threatening. His pelvis and hips were crushed by the 1000 pound ingot bundles. On admission to the hospital, fractured tibia bones extended through the skin in both legs.

Dr. Grunsten placed large rods in both tibias to stabilize the lower leg fractures. Singleton was then placed in long leg casts. Because of the possibility of casting blood clots and causing a pulmonary embolism, it was necessary for Singleton to commence weight bearing on his fractured legs following surgery. This was accomplished by placing him on a tilt table which raised him to a vertical position, causing extreme pain.

Singleton underwent extensive physical therapy during his hospitalization in June and July of 1988. After discharge he required the use of a walker and crutches. Since the healing of his leg fractures, he walks with a cane.

Singleton's arthritic condition

As a result of his injuries, Lionel Singleton has developed traumatic arthritis in both hips. The right hip is more severely affected, where spurs have developed in the joint. The large muscle on the lateral side of his hip was damaged, resulting in a 50% loss of muscle mass needed for movement control. This loss of muscle mass and the spurs

in his hip joint cause significant pain in his right hip when he walks.

Singleton's hip replacements

Dr. Monroe Laborde has treated Singleton since Dr. Grunsten's retirement in 1991. Dr. Laborde testified that Singleton will require a total hip replacement of the right hip as a result of his injuries, and the resultant traumatic arthritis and deterioration of the hip. A second such operation is probable given the ten-year life expectancy of a prosthetic hip.

Dr. Laborde further testified that Lionel Singleton will require a total hip replacement of his left hip during the next 15 years.

Fusion of Singleton's left ankle

Both Dr. Grunsten and Dr. Laborde testified that the accident produced a significant damage to Lionel Singleton's left ankle. The fracture of the left tibia occurred near the left ankle joint, and the bones have healed with a distortion of the tibia bone at the fracture site that has extended into the ankle joint and produced traumatic arthritis. Singleton will require fusion of the left ankle.

Both orthopaedic surgeons testified the injuries to Singleton's hip joints and his left ankle joint produce significant daily pain, and as the joints continue to deteriorate, he will experience increasingly severe joint pain. While fusion of the left ankle will relieve pain, it will also create a solid non-moving joint which will affect his ability to ambulate.

This is not the case with the hip replacements, where residual pain will exist after the surgeries.

Drs. Grunsten and Laborde testified that the large rods in Singleton's tibias must be removed.

GOSCO did not call any medical experts to refute the testimony of Drs. Swartz, Grunsten, and Laborde.

O. *Special Damages*

As a result of his accident on the M/V MA GUAN HAI, Lionel Singleton has been rendered totally and permanently disabled.

Dr. Grunsten testified that during the first two years after the accident, he made many recommendations to F.A. Richard Company, the adjusting company handling the worker's compensation claim for CTS, Singleton's employer. Dr. Grunsten recommended Singleton receive a specific program of job retraining, considering the extent of his injuries and residual disabilities. Without such training, Grunsten reasoned, there would be no realistic chance for Singleton to have job skills to be employable in any job capacity.

Despite Dr. Grunsten's recommendation, F.A. Richard Company hired Jennifer Palmer and Associates who merely provided job leads to Singleton. During the years 1989 through 1991, Singleton applied to approximately forty (40) employers, and was never offered a job.

Lionel Singleton has an I.Q. of 68, and reads at a second percentile capacity, meaning that 98% of the adult

population is more literate. Dr. Cornelius Gorman, a vocational rehabilitation consultant, and Dr. Laborde testified that because of Singleton's educational and intellectual limitations, and the residual physical disabilities resulting from his injuries, Singleton is totally and permanently disabled from gainful employment.

The only witness called by GOSCO on the issue of damages was Carol Coffin, an employee of Jennifer Palmer and Associates. Ms. Coffin acknowledged she had only provided job leads to Singleton, but was critical of his manner of dress, and lack of punctuality and follow-through.

Plaintiff Lionel Singleton has proved the following special damages, which the Court awards him:

Past Medical and Rehabilitation Expenses (Stipulation of the Parties)	$ 80,595.41
Past Lost Wages (Dr. G. Randolph Rice testimony)	124,383.50
Future Loss of Income (Dr. Rice testimony)	207,883.00
Future Medical Expenses (Dr. Rice testimony)	
Hip replacement surgeries	100,425.00
Urethral dilation procedures	20,285.00
Orthopaedic medical treatment - office visits, X-rays, cortisone injections	6,022.00
TOTAL	$539,593.91

P. *General Damages*

Concerning general damages, the evidence showed that Lionel Singleton sustained multiple traumatic injuries including a severed urethra, four pelvic fractures, injuries to his right and left hips, which will require total hip replacements, multiple compound comminuted fractures of his right and left tibia and fibula, a bone fracture extending into his left ankle, and a fracture of the os calcis heel bone of his left foot.

Singleton remained conscious at all times after the accident, and experienced severe pain.

He underwent exploratory abdominal surgery, surgery to his urethra, and bilateral lower leg orthopaedic surgery.

Singleton was hospitalized for forty-five (45) days at Touro Infirmary. He was subsequently hospitalized twice because of bleeding from his urethra, once suffering from shock. During another hospitalization he underwent urologic surgery to reduce urethral scarring.

He has required continuous urethral dilation procedures, which are now at a rate of one per month, and will require this procedure to treat the urethral stricture disease condition for the rest of his life.

Singleton will require at lest five major surgeries: two total hip replacements of his right hip, one total hip replacement of his left hip, a fusion of his left ankle and surgery to remove the rods in his lower legs.

He endures significant daily pain in his hip and ankle regions, and his pain is increasing as the traumatic arthritic condition in his joints deteriorates. Even after the hip replacements he will continue to have significant joint pain for the rest of his life which, along with the ankle fusion, will limit his ability to ambulate. The future surgeries will subject him to great pain, and at best will only reduce the level of pain that he has. Even if the surgeries are successfsul, he will still require the use of a cane to walk.

As a result of the injuries sustained in this accident, Lionel Singleton has lost his livelihood and lives a life of unrelenting pain.

Considering the extent of his injuries, his past and future physical pain and suffering and mental anguish, his disfigurement and general disability, the Court assesses general damages in favor of Lionel Singleton in the total amount of nine hundred fifty thousand dollars (950,000.00). See *Bernard v. U.S.*, 794 F. Supp. 608 (E.D. La. 1991), *aff'd* 968 F.2d 16 (5th Cir. 1992).

Q. *Legal Interest*

Plaintiff is entitled to pre-judgment interest on all damages accrued as of the date of judgment. In admiralty cases, pre-judgment interest is the rule rather than the exception. *McCormack v. Noble Drilling Corp.*, 608 F.2d 169, 175 (5th Cir. 1979). The Court finds that the appropriate rate of interest to be the Louisiana legal rate of interest. Post-judgment shall accrue pursuant to 28 USC §1961. *Peterson v. Waterman Steamship Corp.*, 1993 WL 177194 (E.D.La. May 18, 1993). Accordingly,

IT IS ORDERED THAT

1. Judgment be entered in favor of plaintiff Lionel Singleton and against defendant Guangzhou Ocean Shipping Company in the amount of one million three hundred forty thousand six hundred thirty-four and 52/100 dollars ($1,340,634.52), which figure represents ninety (90%) percent of plaintiff's total damages of one million four hundred eighty-nine thousand five hundred ninety-three and 91/100 dollars ($1,489,593.91), together with pre-judgment interest at the Louisiana legal rate of interest, and post-judgment interest pursuant to 28 USC § 1961.

2. All costs to be borne by defendant Guangzhou Ocean Shipping Company.

New Orleans, Louisiana, this 6th day of September, 1994,

/s/ Henry A. Mentz

UNITED STATES DISTRICT JUDGE